No. 83-1263.

In the
Supreme Court of the United States.

OCTOBER TERM, 1983.

EDWARD CONWAY,
PETITIONER,

v.

CONSOLIDATED RAIL CORPORATION,
RESPONDENT.

Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

PHILANDER S. RATZKOFF,
ROBERT L. FARRELL,
PARKER, COULTER, DALEY & WHITE,
One Beacon Street,
Boston, Massachusetts 02108.
(617) 723-4500
Attorneys for the Respondent

On the Brief:
DEIRDRE H. HARRIS

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Questions Presented.

1. Whether this case presents no special and important reasons to warrant review by this Court, when the Court of Appeals for the First Circuit properly applied the law under the Federal Employers' Liability Act (45 U.S.C. §§ 51-60) and held that there was no evidence of negligence?

2. Whether the Court of Appeals for the First Circuit correctly applied the law of this Court and lower federal courts in holding that a plaintiff who testifies that he received no wages or pay or money whatsoever from "the railroad" has opened the subject of collateral wage substitution payments from the Railroad Retirement Board, thus making it a proper subject of inquiry for cross-examination?

3. Whether there is any conflict in the procedural law in the circuits on whether a plaintiff in a case under the Federal Employers' Liability Act has a "right" to suggest an overall figure for damages to the jury; or, if there is any conflict, whether the question is of sufficient importance to warrant the attention of this Court?

Table of Contents.

Table of Authorities Cited.

CASES.

STATUTES.

MISCELLANEOUS.

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Designation of Corporate Relationships.

Consolidated Rail Corporation was created by the Rail Reorganization Act, 45 U.S.C. § 701 *et seq.* and § 801 *et seq.* See especially 45 U.S.C. § 741. By the terms of the Act, debentures and securities (including preferred stock and common stock) are offered to the United States Railway Association, to employees through stock own-

ership programs, and to others. See 45 U.S.C. §§ 712(a)(3), 716(e)(3), 726(f), and 761.

The only subsidiaries which are wholly owned by Consolidated Rail Corporation are: Pennsylvania Trucklines, Rowayton River Railroad, and Buffalo Creek Railroad.

Statement of the Case.

A. *Facts.*

Respondent sets forth herein its statement of the facts, insofar as petitioner's statement is incomplete or misleading on certain points.

Peititioner was employed as a railroad conductor by respondent on the date of his accident, July 25, 1979 (A. 4-5).[1] He was injured when a piece of luggage (which he characterized as a "footlocker" or a "suitcase") that was being carried off the train by a woman passenger slid off the platform of the "trap" through which the passenger was descending, and hit petitioner in the chest (A. 8-11). The passenger was holding the luggage in her hand, by a handle, and when petitioner tried to help her, she "let the suitcase go and it came down on top of my chest." (A. 9-10.)

B. *Proceedings in the United States District Court.*

Counsel for petitioner stated at trial, in argument opposing respondent's motion for directed verdict, that his sole claim of negligence

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[1] Respondent has cited herein to the Record Appendix in Docket No. 83-1371, as petitioner has done. (See brief of petitioner at 4 n.*.) Although neither party has requested that the appendix be made part of the record in this Court, respondent has provided references herein in the event that the Court wishes to request that the appendix be sent from the Court of Appeals.

was the absence of a rule or regulation promulgated either by respondent or by Amtrak (which owned the train) that would have prohibited luggage over a certain unspecified size from being brought onto the train (A. 31, 154-156). In response to a question from the trial judge, counsel expressly disavowed any other theory of negligence, such as negligent supervision (A. 154-156).

The parties stipulated that there were no rules or regulations pertaining to the weight or size of luggage that could be carried aboard Amtrak coaches (A. 148). The petitioner introduced no evidence that any such rule or prohibition existed anywhere in the railroad industry, and no evidence that the entire industry acted unreasonably in not adopting such a rule. He introduced no evidence, via expert testimony or otherwise, to indicate what size and weight of luggage he was claiming respondent should have prohibited — indeed, there was no evidence of the weight of the piece of luggage that hit him, although he did estimate its size as "probably four feet long and probably two feet wide." (A. 81.)

Respondent rested at the end of petitioner's case (A. 149). The trial judge denied respondent's motion for directed verdict and submitted the case to the jury, which returned a verdict in the amount of $14,000 for petitioner, reduced to $7,000 for what the jury found to be petitioner's contributory negligence of fifty percent.

C. *The Rulings of the First Circuit.*

The sole issue in respondent's cross-appeal to the United States Court of Appeals for the First Circuit (hereinafter "the First Circuit") was whether the petitioner presented enough evidence of negligence to warrant presentation of the case to the jury. Petitioner also appealed.[2]

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[2]Petitioner's appeal was Docket No. 83-1344; respondent's cross-appeal was Docket No. 83-1371.

The First Circuit ordered judgment to enter for respondent, because petitioner had introduced no evidence of negligence.[3] *Conway* v. *Consolidated Rail Corp.*, 720 F.2d 221, 223 (1st Cir. 1983). In its published opinion, the First Circuit also disposed of petitioner's contention that it was error to exclude testimony that he had no authority to stop a passenger carrying a footlocker from boarding a train, noting that petitioner's counsel had stated to the jury, with no objection from respondent or the court, that petitioner had no such authority. *Id.* at 224. In a separate, unpublished opinion (which is reproduced in petitioner's appendix at 14a-16a), the First Circuit rejected the two remaining contentions made by petitioner in his appeal (Docket No. 83-1344).[4]

Further facts relating to the second and third issues that petitioner claims are presented by his petition are included in argument sections II and III herein.

Summary of Argument.

This case presents no "special and important reasons" within the meaning of Supreme Court Rule 17, for this Court to exercise its dis-

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[3]The First Circuit observed that petitioner "introduced no evidence that any other railroad had a rule on this subject . . . nor was there any expert testimony, either as to need, or how size should be regulated." 720 F.2d 221, 223 (1st Cir. 1983). The First Circuit underscored the basis of its holding when it denied petitioner's petition for rehearing. Although it rejected the petition for rehearing on the basis that it was untimely filed, it took the occasion to observe that "there is no merit [in the petition] in any event. We are not questioning or departing in any way from *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500 (1957), regarding causation, or the degree of negligence. Rather, we held, for reasons given, that there was no evidence of negligence whatever." (Brief for petitioner at 2a.)

[4]It held that: (1) petitioner, having raised "the issue of outside payments," could not object to respondent's inquiry on that subject; and (2) counsel was "in effect, proposing to testify" in attempting to suggest an overall figure for damages to the jury. (Brief for petitioner at 15a.)

cretion to reconsider the opinion of the First Circuit. The First Circuit has both stated and applied the law accurately. There has been no violation of petitioner's right to jury trial, because the First Circuit did not substitute its judgment for that of the jury. Rather, the First Circuit held that there was no evidence upon which a jury could find negligence (pp. 6-8).

Petitioner's remaining contentions are equally devoid of "special and important reasons" for this Court to grant a writ of certiorari. There is no conflict with this Court's decision in *Eichel* v. *New York Central R. Co.*, 375 U.S. 253 (1963), because in the instant case the petitioner testified concerning his non-receipt of collateral payments, thus opening the subject for impeachment purposes (pp. 8-10).

Finally, there is no conflict among the circuits with respect to the purported right of counsel for a plaintiff in a case brought under the Federal Employers' Liability Act to state to the jury his opinion concerning what amount of damages should be awarded, because the Second Circuit cases cited by petitioner do not unequivocally hold that there is such an absolute right. Any conflict is within the Second Circuit. In any event, this procedural question is not sufficiently important to warrant review by this Court (pp. 10-12).

Argument.

Initially, respondent notes that the second and third issues petitioner raises are moot. The First Circuit reversed because evidence of negligence was nonexistent, and the second and third issues both concern damages. In the event that the Court does not agree with this contention, however, respondent has formally argued the second and third issues herein.

I. THE REVIEW OF THE RECORD BY THE COURT OF APPEALS FOR THE FIRST CIRCUIT, WHICH FOUND THE RECORD DEVOID OF ANY EVIDENCE OF NEGLIGENCE, WAS PROPERLY WITHIN THE COURT'S POWER AND BASED ON AN ACCURATE STATEMENT OF THE LAW, AND DID NOT DEPRIVE THE PETITIONER OF A JURY TRIAL.

Petitioner argues that the First Circuit effectively deprived him of a jury trial by reviewing the record and holding that there was no evidence of negligence, and that respondent was entitled to a directed verdict as a matter of law.

The First Circuit accurately stated the law concerning standards of proof in cases brought under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (hereinafter "FELA"). See generally *Burrell* v. *McCray*, 426 U.S. 471 (1976) (Stevens, J., concurring in dismissal of writ of certiorari) (no need to grant certiorari if law stated and applied accurately). Liability may only be imposed, by the terms of § 51 of FELA, for injury or death "resulting in whole or in part from the negligence of any of the offices, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence . . . ." It has been uniformly held that the FELA plaintiff must show *some* causal negligence on the part of the employer; the FELA is not a workers' compensation statute. E.g., *O'Hara* v. *Long Island R. Co.*, 665 F.2d 8, 9 (2d Cir. 1981); *New York, New Haven & Hartford R. Co.* v. *Cragan*, 352 F.2d 463, 464 (1st Cir. 1965), cert. denied, 386 U.S. 1035 (1967).

The *Rogers* case,[5] upon which petitioner chiefly relies, merely characterized the FELA standard of proof of negligence as different from that of common law cases; the employee must show "that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." 352 U.S. at 506.

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[5] *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500 (1957).

The First Circuit held, properly, that the *Rogers* standard was not met. 720 F.2d at 223.[6] Petitioner's sole theory of negligence at trial had been the failure to have an absolute prohibition, in the form of a rule or regulation, which would have kept the luggage in question off the passenger car of the train. In reversing the judgment of the trial court, the First Circuit relied in part on *Kuberski* v. *New York Central R. Co.*, 359 F.2d 90, 95 (2d Cir. 1966), cert. denied, 386 U.S. 1036 (1967).

In *Kuberski* the plaintiff based his claim of negligence upon failure of the defendant railroad to have a "motor scooter" which would have carried equipment to assist employees in closing doors. The plaintiff claimed that such equipment would have prevented his accident. The Second Circuit rejected this theory, on the ground that the plaintiff had introduced no evidence to show that it was good industry practice to have such a scooter (or equipment) accessible to employees. Alternatively, the *Kuberski* court observed, the plaintiff could have followed the rationale of *The T.J. Hooper*, 60 F.2d 737 (2d Cir.), cert. denied sub nom. *Eastern Transp. Co.* v. *Northern Barge Corp.*, 287 U.S. 662 (1932), and introduced evidence that the entire railroad industry somehow "unduly lagged" in not having such a scooter available. This he had also failed to do. *Kuberski, supra*, 359 F.2d at 93, quoting from *The T.J. Hooper, supra* at 740.

In the present case, as in *Kuberski*, there was no evidence upon which a jury could base a finding that it was negligent for the respondent to fail to promulgate a rule (or to ascertain that Amtrak had promulgated a rule) to exclude luggage, except the happening of this accident. Furthermore, as the First Circuit observed in its published opinion, by petitioner's testimony this was the first accident of this type that he knew of in twenty-seven years of employment with respondent. Thus, there was also no evidence of foreseeability. 720 F.2d at 223-224.

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[6] Although the First Circuit did not cite *Rogers* in its principal opinion, it did refer to the *Rogers* standard in ruling on the petition for rehearing. See note 3, *supra*.

Although the First Circuit expressed its views on the advisability of such a proposed rule, it was not substituting its judgment for that of the jury on that question. Rather, it held that there was "no evidence of negligence whatever" upon which a jury could base a verdict (see brief for petitioner at 2a).

In summary, the First Circuit both stated and applied the law correctly. There has been no denial of a right to jury trial. This case presents no "special and important reasons" for the Court to reconsider the First Circuit's review of the evidence. See generally *Rice* v. *Sioux City Mem. Park Cemetery*, 349 U.S. 70 (1955).

II. There is no Conflict Between the Decision of the First Circuit in This Case and any Decision of This Court.

Petitioner claims that the trial court's ruling allowing counsel for respondent to question petitioner concerning his receipt of benefits from the Railroad Retirement Board directly conflicts with the decision of this Court in *Eichel* v. *New York Central R. Co.*, 375 U.S. 253 (1963). There is no such conflict.

Respondent has reproduced in its appendix the full portions of the trial transcript in which disability benefits were raised. In summary, petitioner's counsel inquired of petitioner whether he had received "vacation pay or anything," "wages," and whether he was "paid any money whatsoever by the railroad for the 83 days [he was] out of work." (A. 17, 147.)

Petitioner answered all questions in the negative, and responded to the last question by saying, "I wasn't paid one penny." (A. 147.) Although the judge initially sustained petitioner's objection, respondent's counsel was permitted after the last exchange to inquire whether petitioner was paid "a weekly sum of money by the Railroad Retirement Board for the period of time you were out." (A. 147.) Petitioner testified he received approximately $125.00 per week

(A. 147), and the trial judge immediately instructed the jury that "that information is irrelevant" in light of the stipulation that lost wages were $7,591 (A. 148). He further told the jury that if they found liability, "then you will include in your consideration $7,591, and whatever other damages that I will define for you that he may be entitled to." (A. 148.)

The collateral source rule precludes admission of evidence of benefits paid by a source independent of the tortfeasor, unless the evidence is probative on an issue such as credibility. M. Minzer et al., Damages in Tort Actions §§ 17.00, 17.02[3] (1982). The *Eichel* case stands for the basic collateral source rule in the FELA context. However, the *Eichel* case did not involve a situation in which the plaintiff-employee opened up the subject of collateral payments, and therefore is not on point. See *Gladden* v. *P. Henderson & Co.*, 385 F.2d 480 (3d Cir. 1967) (distinguishing *Eichel*), cert. denied, 390 U.S. 1013 (1968). See also *Hannah* v. *Haskins*, 612 F.2d 373, 375 (8th Cir. 1980).

It is a basic principle of the law of evidence that on cross examination, defense counsel may inquire into matters opened by plaintiff's counsel on direct examination, and matters affecting the credibility of a witness. Fed. R. Evid. 611(b). Once an FELA plaintiff has opened, on direct examination, the issue of payments from a collateral source, the defendant is entitled to cross examine him on the subject. *Hannah, supra*; *Gladden, supra*.

Petitioner, in his petition before this Court, argues that he testified only that he had received no payments from respondent, and that the Railroad Retirement Board "is entirely separate and distinct from [respondent]." (Brief for petitioner at 19.) The fair meaning of questions posed by petitioner's counsel, and of petitioner's responses, however, is that petitioner was receiving no payments of any kind during his disability period, and was left destitute. The trial judge, and the First Circuit, ruled properly that the subject had been opened by petitioner, and respondent was entitled to explore the subject

under Rule 611 (b) and the above-cited cases. Hence, there is no conflict between the First Circuit's decision and *Eichel*, and review by this Court is not warranted.

III. THERE IS NOT NECESSARILY A "RIGHT" TO SUGGEST A FIGURE FOR DAMAGES TO THE JURY IN FELA CASES IN ANY CIRCUIT, AND THUS NO CONFLICT AMONG THE CIRCUITS; EVEN IF THERE IS A CONFLICT THE QUESTION IS NOT IMPORTANT ENOUGH TO DESERVE CONSIDERATION BY THIS COURT.

Petitioner argues that "the right of counsel to suggest damage figures to a federal jury deciding a personal injury case is an important federal procedural issue not yet ruled on by this Court." (Brief for petitioner at 19.) The cases he relies upon for the proposition that the "practice . . . is firmly established in the Second Circuit" are *Modave* v. *Long Island Jewish Medical Center*, 501 F.2d 1065, 1079 (2d Cir. 1974); *Mileski* v. *Long Island R. Co.*, 499 F.2d 1169, 1174 (2d Cir. 1974); and *Philadelphia & Reading R. Co.* v. *Skerman*, 247 F. 269, 271 (2d Cir. 1917).

To the extent that the above cases and later cases construing them recognize a practice in the Second Circuit, the practice apparently is to allow the trial judge discretion whether to permit counsel to suggest a figure for damages during summation. For example, *Mileski* held that the court did not abuse its discretion in allowing references to the amount plaintiff's counsel thought the jury should award for pain and suffering, because defense counsel had not objected or sought curative instruction and, in the absence of such objection and request, the reference was held not to be reversible error. See 499 F.2d at 1174.

Furthermore, the *Skerman* case applied New York law on this point, and thus is of no precedential value in this case.[7] Also, the case held that the judge's charge to the jury (to disregard the reference to amount of damages) had cured any prejudicial effect. 247 F. at 271.

In the *Modave* case, counsel had suggested to the jury that a just verdict " 'should be in the neighborhood between $850,000 and $900,000.' " The Second Circuit relied on the *Skerman* case to the effect that " 'counsel has a clear right to state what the plaintiff asks and expects to recover for his injuries,' " although it said that the trial judge should have given a cautionary instruction if requested. *Modave, supra* at 1079.

Assuming arguendo that the Second Circuit adopted the New York procedural rule in *Skerman* and *Modave*, respondent maintains that later cases in the Second Circuit, at both the trial and appellate levels, have modified the holding that there is a "right" to suggest figures to the jury. For example, the Southern District of New York stated in 1975 that counsel "are permitted to express their opinion as to general damages . . . particularly where no objections to the opinions were expressed by [the appellant's] counsel." *Guerrero* v. *American President Lines, Ltd.*, 394 F.Supp. 333, 337 (S.D.N.Y. 1975). Also in 1975, the Eastern District of New York gave a plaintiff a choice of new trial or remittitur, on the basis of excessiveness of a verdict, and speculated that the excessiveness may have been due to counsel's suggestions of figures and the judge's failure to give a sufficiently strong curative instruction. *Uris* v. *Gurney's Inn Corp.*, 405 F.Supp. 744, 747 (E.D.N.Y. 1975).

Respondent has not located any case in which the Court of Appeals for the Second Circuit has expressly considered the issue since *Modave*, although it did affirm without opinion a case in which the trial court reduced a verdict and observed that it should have

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[7]New York is one of the few jurisdictions in which there is case law to the effect that plaintiff's counsel is entitled to mention the amount sought. See *Rice* v. *Ninacs*, 312 N.Y.S. 2d 246, 251 (1970).

cautioned the jury that it was not bound by counsel's suggestion of a figure. *Pirre* v. *Printing Developments Inc.*, 614 F.2d 1290 (2d Cir. 1979), affirming 468 F.Supp. 1028 (S.D.N.Y. 1979). See 468 F. Supp. at 1038 n.8.

In the instant case, the opinion of the First Circuit on this question was brief: it merely stated that "[c]ounsel was, in effect, proposing to testify. The court was correct in excluding." See note 4, *supra*. This is not necessarily to be construed as an absolute prohibition against suggesting figures, but can as easily be read to mean that the trial judge correctly exercised his discretion in the circumstances.

The discretionary approach is also followed by the Fourth Circuit. See *Murphy* v. *National R. Passenger Corp.*, 547 F.2d 816, 818 (4th Cir. 1977). Furthermore, at least one of the Second Circuit cases (*Mileski*) suggests that the judge has discretion to disallow such comment. *Mileski*, *supra* at 1174. Therefore, it would appear that if there is any conflict, it is within the Second Circuit, and not between or among circuits.

In addition, respondent respectfully suggests that, even if there is a conflict among the circuits, the issue is not of sufficient import to meet the requirement of Rule 17 that certiorari be granted only for "special and important reasons." It is a procedural question, and the Second Circuit practice is not clearly established. The mentioning of figures proved prejudicial in *Pirre* and *Uris*, both *supra*, in both of which an excessive verdict was tied to counsel's suggestion. Since *Mileski* and *Modave* seem to conflict on whether the suggestion of figures is a matter of right or of discretion, perhaps the conflict should be resolved initially in the Second Circuit. In any event, it does not presently merit the attention of this Court.

Conclusion.

For the foregoing reasons, respondent respectfully submits that the present case presents no "special and important reasons" for which a writ of certiorari should be granted, and respectfully requests that the petition be denied.

Respectfully submitted,

PHILANDER S. RATZKOFF,
ROBERT L. FARRELL,
PARKER, COULTER, DALEY & WHITE,
One Beacon Street,
Boston, Massachusetts 02108.
(617) 723-4500
Attorneys for the Respondent

On the Brief:
DEIRDRE H. HARRIS

Appendix

Relevant parts of trial transcript concerning disability benefits.

The following interchanges occurred during the trial concerning disability benefits. On direct examination, Petitioner's counsel inquired:

> Q. Sir, did you receive any vacation pay or anything during the eighty-three days you were off?
>
> A. No, I didn't.
>
> Q. Did you receive any wages at all during the eighty-three days you were off?
>
> A. No.

On cross examination, counsel for Respondent began the following exchange:

> Q. Now, you testified on direct examination that for the twelve weeks that you were out, or the eighty-three days that you were out, you received no pay. Do you remember that testimony?
>
> A. Yes, I did.
>
> [COUNSEL FOR PETITIONER]: Objection. He lost wages, Your Honor.
>
> [COUNSEL FOR RESPONDENT]: The word is pay.

THE COURT: Well, in any event, he says he remembers it, so, the jury will recall what he said or didn't say.

Q. [COUNSEL FOR RESPONDENT]: As a matter of fact, during the entire period of time, those twelve weeks, you did receive money from the railroad, didn't you?

[COUNSEL FOR PETITIONER]: Objection, Your Honor.

After a brief interchange in which Respondent's counsel stated that he was inquiring on the issue of credibility, the court sustained the objection of Petitioner's counsel.

On redirect examination, Petitioner's counsel asked:

Q. Mr. Conway, were you paid any money whatsoever by the railroad for the 83 days you were out of work?

A. I wasn't paid one penny.

On further recross examination by counsel for Respondent, the following exchange occurred:

Q. Mr Conway, were you paid a weekly sum of money by the Railroad Retirement Board for the period of time you were out?

[COUNSEL FOR PETITIONER]: Objection, Your Honor.

THE COURT: The objection's overruled.

Q. [COUNSEL FOR RESPONDENT]: Were you paid a weekly sum of money by the Railroad Retirement Board for every week that you were out of work?

A. Yes.

Q. And, how much were you paid by the Railroad Retirement Board per week?

[COUNSEL FOR PETITIONER]: Objection, Your Honor.

THE COURT: Overruled.

THE WITNESS: Approximately $125 a week

[COUNSEL FOR RESPONDENT]: No further questions.

THE COURT: Any other questions?

[COUNSEL FOR PETITIONER]: No, Your Honor.

THE COURT: All right. You may step down.

The court immediately instructed the jury as follows:

Now, ladies and gentlemen of the jury, essentially I want to advise you that that information is irrelevant. The fact of the matter is that the parties have agreed, have stipulated to, and that's the evidence upon which you're going to make your determination. That there was, that the lost wages of the plaintiff amount to $7,591. If you,

subsequently, if you are to find that the plaintiff is entitled to damages because of negligence of the railroad, of the defendant, which gave rise to those damages, then you will include in your consideration $7,591, and whatever other damages that I will define for you that he may be entitled to. And so, at least, though, there is no disagreement that his lost wages, which he may be entitled, amount to $7,591.

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